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No. 03-956

In the Supreme Court of the United States

BOY SCOUTS OF AMERICA, et al.,
Petitioners,

v.

NANCY WYMAN, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE[1]

The Thomas More Law Center is a national, not-for-profit public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the religious freedom of Christians, time-honored family values, and the sanctity of human life. The Thomas More Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities.

This Court has recognized that litigation by public interest law firms such as the Thomas More Law Center is a form of political expression and association and is often the desirable and orderly way of resolving disputes of broad public interest and obtaining vindication of fundamental rights. Similar to the Boy Scouts, the Thomas More Law Center relies on charitable donations to support its mission.

The Thomas More Law Center has a uniquely Catholic identity as a public interest law firm. As such, its actions are guided by the universal and consistent moral teachings of the Roman Catholic faith, including those that relate to

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[1] This brief is filed with the consent of all parties; copies of their consent letters have been submitted to this Court. Sup. Ct. R. 37.3(a). Additionally, the parties have filed with this Court a blanket consent to the filing of amicus briefs in support of either party. No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Thomas More Law Center, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Thomas More Law Center has no parent corporations and no stock. Sup. Ct. R. 29.6.

homosexuality. As part of its mission, the Thomas More Law Center defends the constitutional rights of freedom of expression, freedom of association, and the free exercise of religion of groups and individuals who oppose homosexuality on moral grounds. The Second Circuit decision in this case, which permits the government to punish an organization based on its opposition to homosexuality, is a profound threat to the constitutional rights of Catholic individuals and organizations, including the constitutional rights of the Thomas More Law Center and its clients.

The Thomas More Law Center appears as amicus curiae in support of Petitioners Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America and urges this Court to grant their Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Less than four years ago, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court held that the Boy Scouts had a First Amendment right of expressive association to exclude avowed homosexual leaders from its membership. Yet, in order to exercise this right, the State of Connecticut is now forcing the Boy Scouts to pay a price by denying them access to a government benefit for which the Boy Scouts would otherwise qualify. By doing so, Connecticut is placing an unconstitutional condition and burden on the Boy Scouts' fundamental rights. It is hardly a "protected" right if the government is permitted to indirectly punish a person or organization for exercising that right—as Connecticut is doing in this case.

Given the nature of the underlying dispute and the primary reason for Connecticut's discriminatory actions toward the Boy Scouts—namely, the Boy Scouts' membership policies

that embody and preserve its organizational values regarding homosexuality—the Second Circuit's opinion threatens not only the First Amendment right to expressive association, but also the First Amendment right to free exercise of religion. This opinion adversely affects the First Amendment rights of the Boy Scouts, and it has far reaching implications that could threaten the constitutional rights of religious-based organizations that seek to promote and preserve their organizational values, particularly with regard to the issue of homosexuality.

In the final analysis, this Court should grant the Petition for Writ of Certiorari because the Second Circuit opinion conflicts with this Court's decisions that protect the freedom of expressive association and it threatens to open the door to indirect attacks against faith-based organizations that engage in the protected rights of expressive association and the free exercise of religion.

ARGUMENT

The Second Circuit opinion threatens to eviscerate the protections of the First Amendment, particularly for those who engage in expressive association based on moral grounds or deeply-held religious convictions. The implications of this decision reach far beyond the parties involved in the present litigation and compel this Court to grant the Petition for Writ of Certiorari. Indeed, permitting this decision to stand would open the door for other governmental action that seeks to advance a political agenda by forcing those who oppose it to relinquish their constitutionally protected views, beliefs, and practices in exchange for a government benefit that was otherwise available. As this case demonstrates, this is particularly troubling for organizations with traditional moral values, such as the Boy Scouts, and for religious

organizations, such as those that adhere to the teachings of the Roman Catholic faith.

Although the Second Circuit's decision addressed the issues presented in the context of the "First Amendment right of expressive association," Pet. App. 13a, its decision will also adversely affect the right to free exercise of religion, as discussed below, which further commends this case for review.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedom of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). This right includes, for example, the right of the Boy Scouts to exclude avowed homosexual leaders from its membership. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). And this Court has previously held that this right is unconstitutionally burdened by such actions as the denial of official campus recognition, without justification, to college organizations, *see Healy*, 408 U.S. at 181, requiring disclosure of an organization's membership lists even though the state had not taken any direct action to restrict the members' right to associate freely, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958), and conditioning a veterans' parade permit on the inclusion in the parade of persons whose views the veterans did not wish to have identified with their expression, *see Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995). Here, the State of Connecticut is conditioning the receipt of a government benefit—participation in the State employee charitable campaign, which is a significant source of funding for local Boy Scout councils—on the Boy Scouts'

surrendering of their constitutional right to expressive association. Indeed, the Second Circuit unapologetically recognized and stated that Connecticut is forcing the Boy Scouts to "pay[] a price" for exercising their First Amendment rights. Pet. App. 26a, n.8.

This Court has consistently voided efforts to condition eligibility for access to government benefits on the waiver of fundamental rights. Thus, for example, in *Rutan v. Republican Party of Illinios*, 497 U.S. 62 (1990), this Court struck down a governor's executive order designed to ensure that hiring, rehiring, transfer, and promotion was limited to employees with connections to the Republican Party, specifically rejecting the assertion that conditioning employment decisions on political association was permissible because no employee had a right to the benefits at issue. This Court wrote:

> For at least a quarter-century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government many not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.* This would allow the government to produce a result which it could not command directly.

Id. at 72 (internal quotation, brackets, and citations omitted) (emphasis added); *see Perry v. Sinderman*, 408 U.S. 593, 598

(1972) (noting that government may not condition public employment opportunities on waiver of First Amendment rights); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (withholding passport of Communist Party member violated freedom of association); *Speiser v. Randall*, 357 U.S. 513 (1958) (holding that tax exemption conditioned on applicant's pledge not to advocate forcible overthrow of government was unconstitutional); *see also Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397, 409 (6th Cir. 1999)(stating that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests–especially his interest in freedom of speech.")(internal quotations and citations omitted).

In *Healey v. James*, 408 U.S. 169, 181-82 (1972), this Court acknowledged that the denial of the use of campus facilities, including the use of campus bulletin boards and the school newspaper, were not insubstantial impediments to the associational rights of a college organization. The Court rejected the argument that the campus organization's First Amendment rights were not violated because the denial of official recognition did not deter in any material way the individual advocacy of the member's personal beliefs. *See id.* at 182-83. Moreover, it was of no moment to this Court's analysis that the campus organization members could still meet as a group off campus, distribute written materials off campus, and meet together informally on campus as individuals. *Id.* In fact, this Court "concede[d] . . . that the administration 'ha[d] taken no direct action . . . to restrict the rights of (petitioners) to associate freely . . . .'" *Id.* (quoting *NAACP*, 357 U.S. at 461).

The *Healey* decision makes clear that "the Constitution's protection is not limited to direct interference with

fundamental rights." *Id.* at 183. Acknowledging its holding in *NAACP v. Alabama ex rel. Patterson*, this Court stated,

> The requirement in [*NAACP v. Alabama ex rel. Patterson*] that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the member's associational rights. Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: "Freedom such as these are protected not only against heavy-handed frontal attacks, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Healy, 408 U.S. at 183.

In the present case, the State is denying the Boy Scouts access to critical funds. Without such funds, local councils would be forced to cut Scouting programs to youth. This threatens the continued viability and existence of the Boy Scouts in a far more significant and meaningful way than denying a college organization access to campus meeting facilities, bulletin boards, and the school newspaper. Despite this Court's admonition, the Second Circuit disregarded, *inter alia*, the practical realities of this case, resulting in a decision that is in direct conflict with controlling Supreme Court precedent. This fact alone warrants this Court's review.

Like the right to expressive association, the right to free exercise of religion is made vulnerable to unconstitutional attacks by the Second Circuit's opinion. The Boy Scouts is an

organization that embodies "traditional values," and by reason of these values, it does not accept atheists or agnostics or avowed homosexual leaders. Similar in certain respects to the Boy Scouts, there are many religious organizations that adhere to certain values, which one could describe as "traditional," because of the organization's religious beliefs, practices, customs, and traditions. For example, the universal and consistent moral teaching of the Roman Catholic Church makes clear that homosexuality is objectively disordered and that homosexual persons are called to chastity. According to the Catechism of the Catholic Church, which is the authoritative teaching of the Roman Catholic faith, "homosexual acts" are "acts of grave depravity" and are "intrinsically disordered. . . . Under no circumstances can they be approved." *Catechism of the Catholic Church* ¶ 2357 (2d ed. 1997). Forcing an organization with a Catholic identity to forego its basic values, beliefs, and practices as a condition for the receipt of a government benefit for which it would otherwise be eligible would clearly abridge the organization's First Amendment right to free exercise of religion, not to mention the organization's right to expressive association.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). The First Amendment excludes all "governmental regulation of religious beliefs." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). As such, "[t]he government may not compel affirmation of religious beliefs, punish the expression of religious doctrine it believes to be false . . . or lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div.*, 494 U.S. at 877 (internal citations omitted). Likewise, the government may not impose special restrictions or disabilities on the basis of

religious beliefs. *See generally McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626; *see also Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) (stating that the Free Exercise Clause embraces two concepts, the freedom to believe and the freedom to act, and that "freedom of conscience . . . cannot be restricted by law"). Indeed, the Free Exercise Clause even forbids "subtle departures from neutrality, and covert suppression of particular religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (internal quotations and citations omitted).

This Court has long held that when the government places its power, prestige, and support "behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

As this Court stated in *City of Hialeah,*

> Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

City of Hialeah, 508 U.S. at 534.

This convergence of controlling legal principles under the Free Speech and Free Exercise provisions yields one consistent result. Just as the State cannot require the Boy Scouts to relinquish its right to free speech and association in exchange for a government benefit, so too the State cannot require a Catholic organization, for example, to relinquish its free exercise right as a condition for receipt of a government benefit. However, the Second Circuit's opinion gives government the power to do indirectly that which it cannot do directly—interfere with fundamental rights. This decision threatens to open the flank of organizations that hold moral and religious beliefs that are inconsistent with the prevailing, "politically correct" views of government officials and expose these organizations to indirect attacks against their fundamental rights. As this Court acknowledged in another context, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). As such, no government official, high or petty, can condition the receipt of government benefits on the relinquishment of certain values and beliefs that the government deems "unorthodox."

According to the well-established precedent of this Court, the First Amendment protects the Boy Scouts and other such organizations from indirect as well as direct attacks against their fundamental rights. The Second Circuit's opinion is in direct conflict with this precedent. Therefore, this Court should grant the Petition for Writ of Certiorari.

CONCLUSION

This Court should grant a writ of certiorari in this case for the above-stated reasons, as well as for the reasons set forth in the Petition.

Respectfully submitted,

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